No. 26218 - Marvin T. Bowers, et al., as Class Representatives, v. Gretchen Wurzburg, The Southland Corporation, et al.

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OF WEST VIRGINIA

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Davis, J., dissenting:

I dissent because the majority opinion obliterates existing standards for challenging a motion for summary judgment. By addressing the instant appeal on the merits, the majority has instructed the bar that it is no longer necessary for a plaintiff to respond in the circuit court to a defendant's motion for summary judgment. I will first review the procedural facts relevant to my dissent, and follow with a discussion of the applicable law.

On July 20, 1998, Gretchen L. Wurzburg (hereinafter "Ms. Wurzburg"), a defendant below, filed a motion for summary judgment. The record indicates that her motion was accompanied by a supporting memorandum and a sworn affidavit. Two exhibits were attached to the sworn affidavit, a copy of the lease between Wurzburg and the Southland Corporation (hereinafter "Southland") and a copy of a letter from Southland notifying Ms. Wurzburg of its plan to install and operate self-service gasoline equipment. The evidence accompanying Ms. Wurzburg's motion established, *inter alia*, that she was not aware of any dangerous or defective conditions on the property at the time she surrendered control of it to Southland and that she had not exercised any control over the leased premises during the term

of the lease.[1]

There was nothing in the record before this Court in connection with the plaintiffs' appeal indicating that they responded in any way to Ms. Wurzburg's motion for summary judgment, or that they attempted to persuade the circuit court to apply the

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[1]In her memorandum supporting her motion for summary judgment, Ms. Wurzburg argued, generally, that the existing law regarding landlord liability was reflected in the following three syllabus points from *Cowan v. One Hour Valet, Inc.*:

> [3.] The general rule is that a landlord or lessor is not liable for personal injury sustained on the leased premises, by reason of a defective condition thereof arising after the demise, by the tenant or those entering on the premises under the tenant's title.
>
> [4.] Ordinarily, an invitee of a lessee or tenant stands in the same shoes as the tenant and the lessor is not liable for injuries suffered by an invitee of the tenant for defective condition of the premises, unless he would have been liable to the tenant.
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> . . . .
>
> [7.] A landlord or lessor may be held liable to third parties where he has knowledge or should have known of a defective condition at the expiration of a lease and does not disclose or repair such condition before he renews the lease or rents the premises to a new tenant.

151 W. Va. 941, 157 S.E.2d 843 (1967). In its order granting summary judgment, the circuit court additionally recognized that "[i]n cases dealing with premises liability the Courts have generally held that 'the principle [] liability results either from control[] of the subject area or from a specific wrongful act.'" (quoting *Durm v. Heck's, Inc.*, 184 W. Va. 562, 565, 401 S.E.2d 908, 911 (1991)).

Restatement sections they advocated in their appeal to this Court.

On October 30, 1998, the circuit court entered summary judgment for Ms. Wurzburg. Thereafter, on November 17, 1998, the plaintiffs filed a "MOTION UNDER RULE 59(e) TO ALTER AND AMEND ORDER GRANTING SUMMARY JUDGEMENT FOR DEFENDANT WURZBURG." The plaintiffs' motion stated, in full:

> Plaintiffs move the Court under the provisions of Rule 59(e), Rules of Civil Procedure, and [sic] accordance with the timely filing requirements of Rule 6(a), Rules of Civil Procedure, to alter and amend its order, entered October 30, 1998, granting defendant Gretchen Wurzburg's Motion for Summary Judgment.
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> 1. Plaintiffs assert that the Court made incomplete findings of fact thereby leading it to error.
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> 2. The Court completely misinterpreted, misapplied, and erroneously concluded the law governing landlord-lessor liability.
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> 3. The Court failed or refused to consider or rule on defendant Wurzburg's independent violations of the law as a basis for liability to plaintiffs.

On December 17, 1998, the circuit court denied the plaintiffs' motion and they subsequently appealed to this Court.

Heretofore, the law has been clear. To successfully respond to a motion for summary judgment, a plaintiff was required to meet his or her burden of establishing the existence of a genuine question of material fact by providing the circuit court with a

memorandum presenting any legal arguments against summary judgment,[2] and/or evidence in the form of affidavits, depositions or answers to interrogatories. *See Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("[T]his Court[,] for obvious reasons, will not consider *evidence or arguments* that were not presented to the circuit court for its consideration in ruling on the motion [for summary judgment]." (emphasis added)).

In this regard, Rule 56(e) of the West Virginia Rules of Civil Procedure specifically directs:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In addition, this Court has explained the circumstances under which summary judgment is appropriate and the associated burden on a party resisting summary judgment:[3]

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[2]The plaintiffs' argument to this Court relied on the adoption of certain Restatement sections and questions of fact associated therewith.

[3]Needless to say,

> "'"[a] motion for summary judgment should be granted only when it is clear that [there is] no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty &*

(continued...)

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). Further describing the non-moving party's burden, we have held:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further

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[3](...continued)
Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

Syl. pt. 1, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997). In defining the concept of a genuine issue of fact, we have explained:

> "Roughly stated, a [']genuine issue['] for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. *The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed [']material[']* facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

Syl. pt. 2, *Tolliver*, 201 W. Va. 509, 498 S.E.2d 702 (emphasis added).

> discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. pt. 3, *id.* We have also elaborated on this standard by clarifying that, "in relation to (1) and (2) above, the non-moving party must, *at a minimum*, offer more than a 'scintilla of evidence' to support his or her claim." *Jividen v. Law*, 194 W. Va. 705, 713, 461 S.E.2d 451, 459 (1995) (emphasis added) (citing *Williams*, 194 W. Va. 52, 459 S.E.2d 329). *See also Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994) ("[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986))). Indeed,

> [t]o meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment *must* be granted. *See Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 1694, 123 L. Ed. 2d 317, 328 (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884, 110 S. Ct. 3177, 3186, 111 L. Ed. 2d 695, 713 (1990).

Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. at 699, 474 S.E.2d at 879.

In *Powderidge*, this Court additionally commented that:

> Rule 56 does not impose upon the circuit court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Nor is it our duty to do so on appeal. *Because the plaintiff filed no fact-specific affidavit, it did not meet its burden to designate specific facts showing a genuine issue for trial.*

196 W. Va. at 700, 474 S.E.2d at 880 (emphasis added). The *Powderidge* Court declined to consider an affidavit that was subsequently tendered to this Court in connection with the plaintiff's appeal of the summary judgment order because that affidavit had not been presented to the circuit court. In so ruling, the Court stated:

> Although our review of the record from a summary judgment proceeding is *de novo*, this Court[,] for obvious reasons, will not consider *evidence or arguments* that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.

Powderidge, 196 W. Va. at 700, 474 S.E.2d at 880 (second emphasis added).

Even though our review of a circuit court's decision on summary judgment is *de novo*,[4] it is, nevertheless, a *review*. Our task is to consider the evidence that was before the circuit court to determine whether summary judgment was appropriate. As indicated above, we have repeatedly admonished that nonjurisdictional issues not raised before the trial court will not be addressed on appeal.[5]

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[4]*See* Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

[5]*See, e.g., State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W. Va. 690, 699, 510 S.E.2d 764, 773 (1998) ("Typically, we have steadfastly held to the (continued...)

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rule that we will not address a nonjurisdictional issue that has not been determined by the lower court."); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 150 n.27, 506 S.E.2d 578, 593 n.27 (1998) ("'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.'" (citation omitted)); *Hartwell v. Marquez*, 201 W. Va. 433, 442, 498 S.E.2d 1, 10 (1997) ("'It is a well established principle that this Court will not decide nonjurisdictional questions which have not been raised in the court below.'" (citations omitted)); Syl. pt. 2, *Trent v. Cook*, 198 W. Va. 601, 607, 482 S.E.2d 218, 224 (1996) ("'[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.'" (citations omitted)); Syl. pt. 3, *Voelker v. Frederick Bus. Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995) ("'"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken."'" (citations omitted)); Syl. pt. 3, *Hall's Park Motel, Inc. v. Rover Constr., Inc.*, 194 W. Va. 309, 460 S.E.2d 444 (1995) ("'In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which have not been decided by the court from which the case has been appealed.'" (citation omitted)); Syl. pt. 4, *State ex rel. State Line Sparkler of WV, Ltd. v. Teach*, 187 W. Va. 271, 418 S.E.2d 585 (1992) ("'"This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."'" (citations omitted)); Syl. pt. 8, *Charlton v. Charlton*, 186 W. Va. 670, 413 S.E.2d 911 (1991) (same); Syl. pt. 2, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987) (same); Syl. pt. 2, *Duquesne Light Co. v. State Tax Dep't*, 174 W. Va. 506, 327 S.E.2d 683 (1984) (same); Syl. pt. 5, *Randolph v. Koury Corp.*, 173 W. Va. 96, 312 S.E.2d 759 (1984) (same); Syl. pt. 3, *Wells v. Roberts*, 167 W. Va. 580, 280 S.E.2d 266 (1981) ("As a general rule '[t]his Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.' Syl. pt. 1, *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980)."); Syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978) (same); Syl. pt. 1, *Adams v. Bowens*, 159 W. Va. 882, 230 S.E.2d 481 (1976) (same); Syl. pt. 2, *Young v. Young*, 158 W. Va. 521, 212 S.E.2d 310 (1975) ("In the exercise of its appellate jurisdiction, this Court cannot consider nonjurisdictional errors not raised and decided by the trial court."); Syl. pt. 6, in part, *Parker v. Knowlton Constr. Co., Inc*., 158 W. Va. 314, 210 S.E.2d 918 (1975) (same); Syl. pt. 1, *Boury v. Hamm*, 156 W. Va. 44, 190 S.E.2d 13 (1972) (same); Syl. pt. 1, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971) (same); Syl. pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971) (same); Syl. pt. 4, *In re Morgan Hotel Corp.*, 151 W. Va. 357, 151 S.E.2d 676 (1966) (same); Syl. pt. 10, in part, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963) ("[I]n cases within [this Court's] appellate
(continued...)

In the present case, I believe Ms. Wurzburg met her initial burden of demonstrating that there was no question of fact as to her liability regarding the gasoline storage tanks. She met her burden through her memorandum offering legal support for her motion for summary judgment and its accompanying sworn affidavit with attached exhibits. Thus, the burden then shifted to the plaintiffs to offer more than a scintilla of evidence to establish the existence of a genuine issue of material fact. The record on appeal contains absolutely no evidence demonstrating that the plaintiffs met this burden. In fact, the record indicates that the plaintiffs failed to respond at all to Ms. Wurzburg's motion for summary judgment prior to the circuit court's ruling. Only after the circuit court granted summary judgment for Ms. Wurzburg did the plaintiffs respond with their motion to alter and amend the circuit court's order. Assuming, without deciding, that it was proper for the plaintiffs to raise their arguments at this late stage, they nevertheless utterly failed to produce any evidence or advance any specific legal argument establishing the existence of a justiciable issue of fact.

The plaintiffs' meager motion in no way preserved the arguments they asserted

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jurisdiction it will not consider or decide nonjurisdictional questions which have not been determined by the trial court."); Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) (same); Syl. pt. 1, *Vecellio v. Bopst*, 121 W. Va. 562, 6 S.E.2d 708 (1939) ("This Court need not pass on questions not raised in the trial court the action of which is being reviewed."); Syl. pt. 3, *Nuzum v. Nuzum*, 77 W. Va. 202, 87 S.E. 463 (1915) ("The [S]upreme [C]ourt will not consider questions not yet acted upon by the circuit court in the case."); Syl. pt. 7, *Kesler v. Lapham*, 46 W. Va. 293, 33 S.E. 289 (1899) (same).

on appeal. By considering the plaintiffs' newly made arguments, the majority has ignored the specific mandates of Rule 56(e) as well as a long history of precedent set forth by this Court, as well as the Supreme Court of the United States.[6] By doing so, the majority has instructed the bar that it is not necessary to respond in the circuit court to a motion for summary judgment. Rather, a party may silently wait for the circuit court's ruling, and, if the ruling is unfavorable, he or she may then come to this Court to present evidence against summary judgment. Thus, the majority's action, in addition to ignoring existing law, deprives this Court of its appellate role, and further abrogates the circuit court's role as the court of first impression. Therefore, I must respectfully dissent.

[6]We often look to federal law in interpreting our rules of civil procedure, because our rules are nearly identical to the Federal Rules of Civil Procedure.